

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

A PROFESSIONAL CORPORATION

1155 CONNECTICUT AVENUE, N.W. • SUITE 1200 • WASHINGTON, D.C. 20036 • TELEPHONE (202) 659-5800 • FACSIMILE (202) 659-1027

HAL R. HORTON (1944 - 1998)

RONALD G. BIRCH**
WILLIAM H. BITTNER
KATHRYN A. BLACK
SUZANNE CHEROT
DEVIN L. CROCK†
JON M. DEVORE**
MARK E. FINEMAN, P.E.
GREGORY S. FISHER
DOUGLAS S. FULLER*

MAX D. GARNER
DAVID KARL GROSS
TINA M. GROVIER
WILLIAM P. HORN*
STEPHEN H. HUTCHINGS
SCOTT M. KENDALL
DANIEL C. KENT
THOMAS F. KLINKNER

DAVID E. LAMPP*
STANLEY T. LEWIS
JAMES H. LISTER*†
GREGORY A. MILLER
JENNIFER L. OWENS, Ph.D.
MICHAEL J. PARISE
TIMOTHY J. PETUMENOS
ELISABETH H. ROSS**

OF COUNSEL:
JENNIFER C. ALEXANDER
SHELLEY D. EBENAL
KENNETH E. VASSAR

1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3399
(907) 276-1550
FACSIMILE (907) 276-3680

* D.C. BAR
** D.C. AND ALASKA BAR
† MARYLAND BAR
‡ VIRGINIA BAR
ALL OTHERS ALASKA BAR

March 19, 2007

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: WC Docket No. 96-45 -- *In re Federal-State Joint Board on Universal Service*

CC Docket No. 05-337 -- *High-Cost Universal Service Support*

Dear Ms. Dortch:

Attached for filing in the above-referenced dockets are two letters to Chairman Kevin J. Martin from a number of state utility boards and commissions requesting that the FCC establish an early timetable for resolution of issues remanded to the agency over two years ago, in 2005, by the Court of Appeals for the Tenth Circuit in *Qwest Communications International, Inc. v. Federal Communications Commission*.¹

The two letters are similar. All signatories to the letters, including the Vermont Public Service Board, the Vermont Department of Public Service, the South Dakota Public Utilities Commission, the Kentucky Public Service Commission, the Montana Public Service Commission, the Nebraska Public Service Commission, the Wyoming Public Service Commission and the Maine Public Utilities Commission, urge the FCC to resolve these issues expeditiously. In the second of the two letters, the Wyoming Public Service Commission and the Maine Public Utilities Commission make an additional statement (contained in the second to last paragraph) concerning the option of using the Federal Benchmark Mechanism Amendment to the Missoula Plan as a venue for resolution

If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

BIRCH, HORTON, BITTNER
AND CHEROT

Elisabeth H. Ross

Elisabeth H. Ross

¹ See *Qwest Comms. Int'l, Inc. v. FCC*, 398 F. 3d 1222 (10th Cir. 2005) ("Qwest II").

March 19, 2007

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Qwest Communications International, Inc. v. Federal Communications Commission*, United States Court of Appeals for the Tenth Circuit,
Case No. 03-9617;

In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45;

High-Cost Universal Service Support, WC Docket No. 05-337

Dear Chairman Martin:

The undersigned state commissions are writing regarding the remand from the U.S. Court of Appeals for the Tenth Circuit ("10th Circuit") in *Qwest Communications International, Inc. v. Federal Communications Commission* ("*Qwest I*").¹ In that case, the Court found that the Federal Communications Commission ("FCC") did not demonstrate that it complied with a statute that obligates it to preserve and advance universal service in high-cost areas and to ensure that reasonably comparable rates exist between rural and urban areas. The problem arises from the insufficient support for high cost rural areas served by "non-rural" carriers. Although called "non-rural," many of these larger carriers actually serve the most rural areas in our states. We are writing to express our concern at the delay in adoption of an FCC order responsive to that decision.

Adequate support for rural consumers served by larger carriers is an issue not yet sufficiently addressed by the FCC. Although the underlying universal service statute was enacted eleven years ago, the FCC has not shown that its non-rural universal service rules comply with law. Furthermore, two judicial reviews have produced two remands. The first reversal of the FCC's non-rural universal service fund rules was handed down in 2001.² After the FCC acted on that remand, the 10th Circuit again reversed and remanded the FCC's rules in *Qwest II*. In both cases, the 10th Circuit instructed the FCC that it is under a statutory mandate to implement a funding mechanism accounting for all the statutory principles in the law.³ In *Qwest II*, the Court found that the FCC had adopted a "faulty, and indeed largely unsupported, construction of the Act" that is "manifestly contrary to the statute."⁴ The rules based on that construction are still in effect.

¹ *Qwest Comms. Int'l, Inc. v. FCC*, 398 F. 3d 1222, 1234 (10th Cir. 2005) ("*Qwest I*").

² *Qwest Corp. v. FCC*, 258 F. 3d 1191 (10th Cir. 2001) ("*Qwest I*").

³ *Qwest II* at 1234; *Qwest I* at 1200.

⁴ *Qwest II* at 1235.

The *Qwest II* Court also directed the FCC to implement rules consistent with section 254 of the Telecommunications Act of 1996 "in an expeditious manner, bearing in mind the consequences inherent in further delay."⁵ *Qwest II* was decided two years ago. Nine months after the Court's decision, in December of 2005, the FCC issued a Notice of Proposed Rulemaking ("NPRM"). While the NPRM sought comment on a wide variety of issues, it contained no specific proposals for action. The comment cycle on the NPRM closed in the spring of 2006. Since then, the FCC has taken no further formal action, and we have no information suggesting that the FCC has developed a specific proposal to correct its rules, or that it will move toward adopting revised rules soon.

The state commissions listed below request that the FCC try to resolve these issues in a manner that promotes comity between the federal government and the affected states. The Federal Benchmark Mechanism Amendment to the Missoula Plan filed by several rural states on January 30, 2007, and supported by many rural LECs and AT&T, may provide an appropriate venue for this resolution.

Consumers in rural states served by non-rural carriers are being irreparably harmed by insufficient universal service funding. We urge the FCC to establish a timetable for the early resolution of these issues.

Sincerely,

_____/s/_____
Joel Shifman, Senior Advisor
Maine Public Utilities Commission
242 State Street
State House Station 18
August ME 04333
Tel: (207) 287-3831

_____/s/_____
Mary Byrnes, Commissioner
Wyoming Public Service Commission
Hansen Building, 2515 Warren Avenue
Suite 300
Cheyenne WY 82002
Tel: (307) 777-7427

⁵ *Qwest II* at 1239.

March 19, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Qwest Communications International, Inc. v. Federal Communications Commission*, United States Court of Appeals for the Tenth Circuit,
Case No. 03-9617;

In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45;

High-Cost Universal Service Support, WC Docket No. 05-337

Dear Chairman Martin:

The undersigned state commissions are writing regarding the remand from the U.S. Court of Appeals for the Tenth Circuit ("10th Circuit") in *Qwest Communications International, Inc. v. Federal Communications Commission* ("*Qwest I*").¹ In that case, the Court found that the Federal Communications Commission ("FCC") did not demonstrate that it complied with a statute that obligates it to preserve and advance universal service in high-cost areas, and to ensure that reasonably-comparable rates exist between rural and urban areas. The problem arises from the insufficient support for high-cost rural areas served by "non-rural" carriers. Although called "non-rural," many of these larger carriers actually serve the most rural areas in our states. We are writing to express our concern at the delay in adoption of an FCC order responsive to that decision.

Adequate support for rural consumers served by larger carriers is an issue not yet sufficiently addressed by the FCC. Although the underlying universal service statute was enacted eleven years ago, the FCC has not shown that its non-rural universal service rules comply with law. Furthermore, two judicial reviews have produced two remands. The first reversal of the FCC's non-rural universal service fund rules happened in 2001.² After the FCC acted on that remand, the 10th Circuit again reversed and remanded the FCC's rules in *Qwest II*. In both cases, the 10th Circuit instructed the FCC that it is under a statutory mandate to implement a funding mechanism accounting for all the statutory principles in the law.³ In *Qwest II*, the Court found that the FCC had adopted a "faulty, and indeed largely unsupported,

¹ *Qwest Comms. Int'l, Inc. v. FCC*, 398 F. 3d 1222, 1234 (10th Cir. 2005) ("*Qwest I*").

² *Qwest Corp. v. FCC*, 258 F. 3d 1191 (10th Cir. 2001) ("*Qwest I*").

³ *Qwest II* at 1234; *Qwest I* at 1200.

construction of the Act” that is “manifestly contrary to the statute.”⁴ The rules based on that construction are still in effect.

The *Qwest II* Court also directed the Commission to implement rules consistent with section 254 of the Telecommunications Act of 1996 “in an expeditious manner, bearing in mind the consequences inherent in further delay.”⁵ *Qwest II* was decided two years ago. Nine months after the Court’s decision, in December of 2005, the Commission issued a Notice of Proposed Rulemaking (“NPRM”). While the NPRM sought comment on a wide variety of issues, it contained no specific proposals for action. The comment cycle on the NPRM closed in the spring of 2006. Since then, the FCC has taken no further formal action, and we have no information suggesting that the FCC has developed a specific proposal to correct its rules, or that it will move toward adopting revised rules soon.

The state commissions listed below request that the FCC try to resolve these issues in a way that promotes comity between the federal government and the affected states. Consumers in rural states served by non-rural carriers are being irreparably harmed by insufficient universal service funding. We urge the FCC to establish a timetable for the early resolution of these issues.

Sincerely,

_____/s/_____
James Volz, Chairman
Vermont Public Service Board
112 State Street
Montpelier VT 05602-2710
Tel: (802) 828-2358

_____/s/_____
David O’Brien, Commissioner
Vermont Department of Public Service
112 State Street
Montpelier VT 05602-2710
Tel: (802) 828-2811

⁴ *Qwest II* at 1235.

⁵ *Qwest II* at 1239.

_____/s/_____
Mark David Gass, Chairman
Kentucky Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort KY 40602
Tel: (502) 564-3940

_____/s/_____
Greg Jergeson, Chairman
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena MT 59620-2601
Tel: (406) 6166

_____/s/_____
Martin Jacobson
Special Assistant Attorney General
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena MT 59620-2601
Tel: (406) 444-6178

_____/s/_____
Rod Johnson, Chairman
Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln NB 68508
Tel: (402) 471-3101

_____/s/_____
Dustin M. Johnson, Chairman
South Dakota Public Utilities Commission
500 E. Capitol
Pierre SD 57501-5070
Tel: (605) 773-3201